



39 CFR Part 230

Rules Governing Compliance with Subpoenas, Summonses, and Court Orders for the Office of Inspector General

AGENCY: Postal Service™.

ACTION: Final rule.

SUMMARY: The Postal Service is amending the Code of Federal Regulations to state rules that govern compliance with subpoenas, summonses, and court orders served on employees of the Office of Inspector General where neither the Postal Service, the United States, nor any other Federal agency is a party.

DATES: Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Matthew C. Glover, Director, Legal Services, Office of Inspector General, at (703) 248-4584.

SUPPLEMENTARY INFORMATION: On October 3, 2003, the Postal Service published rules governing compliance with subpoenas, summonses, and court orders served on employees of the Office of Inspector General.

Those rules appear in subpart B of part 230. This publication amends and updates the existing rules.

List of Subjects in 39 CFR Part 230

Administrative practice and procedure.

For the reasons stated in the preamble, the Postal Service amends 39 CFR part 230 as follows:

PART 230—OFFICE OF INSPECTOR GENERAL

1. The authority citation for part 230 continues to read as follows:

Authority: 5 U.S.C. app. 3; 39 U.S.C. 401(2) and 1001.

2. Revise subpart B to read as follows:

Subpart B—Rules Governing Compliance with Subpoenas, Summonses, and Court Orders by Postal Employees within the Office of Inspector General Where Neither the Postal Service, the United States, Nor Any Other Federal Agency Is a Party

§ 230.10 Demands for records or testimony.

(a) *Scope and applicability.* (1) This section sets forth the *Touhy* regulations of the U.S. Postal Service Office of Inspector General. It applies to situations where an employee of the Office of Inspector General has been summoned, subpoenaed, or given a court order to produce documents or provide testimony in connection with any Federal, State, local court, administrative, or legislative proceeding.

(2) This section does not apply to:

(i) Proceedings where the United States, the Postal Service, or any other Federal agency is named as a party;

(ii) Congressional requests or subpoenas for testimony or documents; or

(iii) Appearances by employees in their private capacities in proceedings unrelated to their Postal Service employment.

(3) This section should be read together with the Freedom of Information Act (FOIA), 5 U.S.C. 552a, which provides additional information about access to records. The provisions of this section do not affect rights and procedures governing public access to official documents pursuant to the FOIA.

(4) This section does not create any right or benefit, substantive or procedural, enforceable by any party against the Office of Inspector General or the U.S. Postal Service.

(b) *General prohibition.* (1) No employee may testify or produce documents concerning information acquired in the course of employment or as a result of his or her relationship with the Postal Service in any case or matter, unless authorized to do so by an authorizing official.

(2) Without written authorization from the authorizing official, the employee must respectfully decline to produce documents, testify, or otherwise disclose the requested information. If the authorization is denied or not received by the return date, the employee

(together with counsel, where appropriate) shall appear at the stated time and place, produce a copy of this section, and respectfully decline to testify or produce any document on the basis of the regulations in this section.

(3) If an attempt is made to compel production of documents during the employee's testimony, the employee is directed to decline to produce the item or information and to state that the material cannot be disclosed or produced without the approval of the authorizing official.

(c) *Procedure to request documents or testimony.* (1) All demands seeking the production of nonpublic documents or employee testimony concerning matters relating to their official duties shall be made in writing and conform to the requirements outlined in paragraphs (c)(2) and (3) of this section.

(2) The requesting party shall serve a summons or subpoena issued in accordance with the appropriate rules of procedure on the General Counsel to the Inspector General at the Office of Inspector General, 1735 North Lynn Street, Arlington, VA 22209-2020.

(3) Together with a summons or subpoena served on the General Counsel, the requesting party shall include an affidavit or sworn declaration containing the following information:

- (i) The title of the case and the forum where it will be heard;
- (ii) The party's interest in the case;
- (iii) The reasons for the demand;
- (iv) If testimony is sought, a detailed summary of the anticipated testimony;
- (v) If testimony is sought, a showing that Office of Inspector General records could not be provided and used in place of the requested testimony;
- (vi) The intended use of the documents or testimony; and
- (vii) An affirmative statement that the documents or testimony is necessary for defending or prosecuting the case at issue.

(d) *Evaluation of a demand for documents or testimony.* (1) The authorizing official will consider the factors in paragraphs (d)(1)(i) through (viii) of this section when deciding whether to authorize testimony or the production of documents:

- (i) Statutory restrictions, as well as any legal objection, exemption, or privilege that may apply;
- (ii) Relevant legal standards for disclosure of nonpublic information and documents;
- (iii) Office of Inspector General rules and regulations;
- (iv) The public interest;
- (v) Minimizing or preventing expenditures of Office of Inspector General time and resources solely for private purposes;
- (vi) Minimizing the appearance of improperly favoring one litigant over another;
- (vii) Minimizing the possibility that the public will misconstrue variances between personal opinions of Office of Inspector General employees and agency policy; and
- (viii) Preserving the integrity of the administrative process.

(2) Where, on the basis of its investigation, the Office of Inspector General has requested or recommended that a State or local prosecuting authority pursue a criminal prosecution or has otherwise approved such a prosecution, that prosecuting authority will be deemed to have made a proper request for information to be used in connection with that prosecution. With respect to other criminal matters pursued in state or local courts, the consideration shall also be given to the additional factors in paragraphs (d)(2)(i) through (iv) of this section:

- (i) The seriousness of the violation or crime involved;
- (ii) The past history or criminal record of the violator or accused;
- (iii) The importance of the legal issues presented; and
- (iv) The relatedness of the crime to the Office of Inspector General's mission.

(3) The following records described in paragraphs (d)(2)(i) through (iii) of this section will not be released:

(i) Records required to remain confidential by the Freedom of Information Act, the Privacy Act, this part, and part 262 of this chapter,

(ii) Records containing information relating to an employee's security or loyalty; and

(iii) Original records.

(4)(i) The following records and testimony may only be produced under the circumstances described in paragraphs (d)(4)(i)(A) through (C) of this section :

(A) The Office of Inspector General Manual and other operating instructions issued to employees when specifically authorized after consultation with the General Counsel to the Inspector General;

(B) Office of Inspector General criminal investigative reports when specifically authorized after consulting with the General Counsel to the Inspector General; and

(C) Information relating to confidential investigative techniques, confidential sources of information, and information that must be kept confidential under the Inspector General Act, as amended, 5 U.S.C. app. 3. Where the authorizing official determines this information would otherwise be appropriate for release under this part, the Office of Inspector General may request an in camera review to determine the necessity for its release.

(ii) The specific limitations on the production of certain categories of information set forth in paragraphs (d)(4)(i)(A) through (C) of this section do not require or imply that other documents or testimony will be authorized without limitation.

(5) When authorizing testimony or the release of documents, the authorizing official will establish the extent of the Office of Inspector General's response.

(i) Permission to testify or to release documents in all cases will be limited to matters outlined in the affidavit or declaration described in paragraph (c)(3) of this section, or to such matters as deemed appropriate by the authorizing official.

(ii) If the authorizing official allows the production of documents or testimony, arrangements shall be made for the taking of testimony or receipt of documents by the method least disruptive to the employee's official duties. Testimony may, for example, be

provided by affidavits, answers to interrogatories, written depositions, or depositions transcribed, recorded, or preserved by any other means allowable by law.

(iii) The Inspector General, authorizing official, or a delegatee may designate an employee other than the employee identified in the request to respond to a request for an appearance.

(6) Upon the authorizing official's issuance of a final determination not to authorize testimony or release records, the party making the request may consult or negotiate with the authorizing official to refine and limit the demand.

(7) Notwithstanding the Office of Inspector General's general commitment to offer all possible assistance to the courts, the disclosure of information falling within the scope of this part is a matter of discretion, resting with the authorizing official. If, in the opinion of the authorizing official requested documents should not be released or testimony should not be provided, that determination will be final.

(e) Representation of an employee in any appearance. At the option of the authorizing official, an Office of Inspector General attorney may make an appearance on behalf of the Office of Inspector General and assist an employee whose appearance has been requested and authorized. The authorizing official may also request assistance from the U.S. Department of Justice.

(f) Expert or opinion witness. Unless authorized by the authorizing official, an employee may not testify as an expert or opinion witness regarding any matter arising out of the employee's duties or functions at the Office of Inspector General for any party other than the United States. A litigant must first obtain the permission of an authorizing official before designating an employee as an expert or opinion witness.

(g) Costs and fees. (1) The Office of Inspector General is authorized to charge reasonable fees to parties demanding documents or information. Unless determined by 28 U.S.C. 1821 or other applicable statute, the costs of responding to a request for documents or testimony shall be borne by the requesting party. As determined by the Office of Inspector General, costs calculated to reimburse the Office for the cost of responding to a demand may include:

- (i) The costs of time expended by employees to process and respond to the demand;
- (ii) Attorney time for reviewing, responding to, or processing the demand and for legal work in connection with the demand;
- (iii) Expenses generated by equipment used to search for, produce, and copy the requested information;
- (iv) Expenses attendant upon an employee's absence from his or her official duties in connection with the case or matter, including the employee's salary and applicable overhead charges;
- (v) Travel costs of any employees who testify or are requested to testify and any agency attorney or other representative who travels in connection with a request for testimony, including lodging and per diem, assessed, as applicable, at the rates and in the manner specified in 39 CFR 265.9; and

(vi) Other costs of providing testimony, including the cost of transcripts.

(2) At the discretion of the Office of Inspector General where appropriate, fees and costs may be estimated and collected before testimony is given.

(h) *Definitions.* The following definitions apply to this section.

Authorizing official means the Inspector General or an official designated by the Inspector General to authorize release of documents or employee testimony.

Case or matter means any civil or criminal proceeding before a court of law, administrative board, hearing officer, or other body conducting a judicial or administrative proceeding. The term also includes proceedings in legislative bodies other than the Congress of the United States.

Demand means any request, order, or subpoena for testimony or the production of documents.

Document includes all information falling within the scope of the terms “documents” and “electronically stored information” in Federal Rule of Civil Procedure 34(a) and any analogous rules applicable to the case or matter in which a demand is made.

Employee includes all current and former employees of the Office of Inspector General (whether temporary or permanent, part-time or full-time), employees of the Postal Service assigned or detailed to the Office of Inspector General, student interns, student cooperatives, contractors, and employees of contractors who have or had access to Office of Inspector General information and records.

Nonpublic means all documents or information not subject to mandatory public disclosure under 39 CFR 265.6(b) or that must be kept confidential under the Inspector General Act of 1978 as amended, 5 U.S.C. app. 3.

Testify or testimony include in-person oral statements before any body conducting a judicial, administrative, or legislative proceeding, statements made in depositions, answers to interrogatories, declarations, affidavits, or other similar documents.

Ruth Stevenson,

Chief Counsel, Federal Compliance.

[FR Doc. 2021-04210 Filed: 3/16/2021 8:45 am; Publication Date: 3/17/2021]